No. 14195.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALEXANDER SWAN, 2d,

Appellant,

vs.

THE FIRST CHURCH OF CHRIST, SCIENTIST, IN BOSTON, MASSACHUSETTS, also known as the Church of Christ (Scientist), a Corporation; THE CHRISTIAN SCIENCE BOARD OF DIRECTORS, and the CHRISTIAN SCIENCE PUBLISHING SOCIETY, a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

The within appeal is from the order of the trial court dismissing with prejudice, the first two causes of action of Appellant's Second Amended Complaint and rendering Summary Judgment in favor of the Appellees as to the third cause of action of such Second Amended Complaint.

Statement of Pleadings and Facts as to Jurisdiction.

(a) *Preliminary Statement:* Subsequent to the granting, by the court, of a "Motion to Dismiss (and) . . . to Quash Service of Summons," on plaintiff's (First) Amended Complaint on the theory that certain corporate

defendants, had voluntarily (though not legally) discontinued their corporate existence and therefore could not be "engaged in business in California" [p. 3], the plaintiff filed his Second Amended Complaint, containing three causes of action [p. 8].

In such Second Amended Complaint, said defendants were each described as "a Juridical Entity, Recognized and Regarded as such, and as a Body Corporate, under the Laws of the Commonwealth of Massachusetts" [p. 81].

Said defendants, (1) The First Church of Christ, Scientist in Boston, Massachusetts, (2) The Christian Science Board of Directors, and (3) The Christian Science Publishing Society, filed ". . . Motions to Dismiss Second Amended Complaint, or in lieu thereof Quash Service of Process Thereon" [p. 36].

Pursuant thereto, four motions were presented and submitted to the trial court for decision.

As set forth in the "Memorandum Decision" of such trial court [p. 80] said four motions were:

> (1) To dismiss the action as to each defendant on the ground the court is without jurisdiction because of failure of the plaintiff to show diversity of citizenship;
>
> (2) To dismiss the action for lack of jurisdiction over the person of each defendant, (a) on the ground that none of defendants are legal entities with capacity to be sued in California on the purported causes of action set forth in plaintiff's complaint; and (b) on the further ground that none of the defendants

is amenable to process within the State of California, viz., is not doing business in California;

(3) To quash service of process upon the defendants on the ground that said process is insufficient and that the purported substituted service of process (on the California Secretary of State) is neither authorized nor valid in the type of action here presented;

(4) To dismiss the second amended complaint and each count thereof against the parties defendant, on the ground (a) that the court lacks jurisdiction over the subject matter alleged in each of the said counts, and (b) on the further ground that each count fails to state a claim upon which relief can be granted.

The first three of such motions and subparagraph (a) of the fourth motion, were decided adversely to the said defendants [pp. 81-96], and by formal Order of Court, were each denied [p. 105]. No appeal therefrom has been taken, and such motions or the order of the court thereon, will not be hereinafter considered.

The fourth motion, predicated allegedly lack of jurisdiction over the subject matter and insufficiency of the statement of a claim was denied by the court on the ground of lack of jurisdiction, but was granted as to the first and second causes of action of the Second Amended Complaint on the ground "that each fails to state a claim for which relief can be granted," and a Summary Judgment, in favor of the defendants, was granted, as to the Third Cause of Action of such complaint [pp. 96-102].

The within appeal was taken solely by plaintiff, as appellant herein, from the formal written order of the trial court,

> "wherein and whereby said defendants' motion to dismiss the first and second counts of plaintiff's Second Amended Complaint on the ground that each fails to state a claim for which relief can be granted, was granted, and from the dismissal with prejudice of said first and second counts of said Second Amended Complaint, and from the Summary Judgment in favor of said defendants and against plaintiff as to the third count of said Second Amended Complaint." [P. 113.]

(b) *Jurisdiction of the District Court:* Each of the three causes of action contained in the Second Amended Complaint, seeks equitable relief and in addition thereto, each of said causes of action seeks damages. The amount of damage so sought in each cause of action exceeds $3,000.00. It is alleged in the first cause of action, in paragraph I, that the plaintiff is a resident of the State of California and that the individual defendants are residents of the State (Commonwealth) of Massachusetts [p. 9]. It is alleged in paragraphs III that the defendant, The First Church of Christ, Scientist, is a "juridical entity duly organized, existing and recognized and regarded as a body corporate under and by virtue of the laws of the Commonwealth of Massachusetts" [p. 9]. The same allegation is made in paragraph IV as to the defendant, The Christian Science Publishing Society, and the same allegation is repeated in paragraph V as to the Christian Science Board of Directors [p. 10]. These paragraphs are realleged in paragraph I of the second cause of action [p. 25] and in paragraph I of the third cause of action

[p. 27]. In the first cause of action, the damage suffered is alleged, in paragraph XXVI, as $100,000.00 [p. 25]; in the second cause of action, the same is alleged, in paragraph XV, in the annual sum of $15,000.00 [p. 26] and in the third cause of action, the same is alleged in paragraphs XI and XII, as $150,000.00 [pp. 32-33].

It is respectfully submitted that jurisdiction herein was therefore in the District Court, pursuant to 28 United States Code Annotated, Section 1332, which provides as follows:

> "DIVERSITY OF CITIZENSHIP; *amount in controversy:*
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:
>
> (1) Citizens of different states . . ."

In each cause of action, the matter in controversy exceeds $3,000.00, damages having been heretofore adjudicated to be a matter in controversy.[1]

The equitable jurisdiction of the court is invoked by reason of the amount of damages to be assessed.[2]

The diversity of the citizenship causing the same to be between "citizens of different states" is predicated upon plaintiff being a citizen of California and the three answering defendants being each respectively, "a juridical entity

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[1]*Hobert v. Chase,* 12 Fed. Rules Dec. 171; *Peyton v. Desmond,* 127 Fed. 1; *Rundle v. Delaware, etc., Canal Co.,* 14 Haw. 80, 14 L. Ed. 335.

[2]*Loew's Inc. v. Cross Bay Amusement Co.,* 59 N. Y. S. 2d 764; *Adam Schuman Assoc. Inc. v. City of N. Y.,* 40 F. 2d 216.

recognized as such and as a body corporate under the laws of the Commonwealth of Massachusetts." It has long been established law that said term, "citizen" includes a corporation.[3] The citizenship of a corporation, for the purpose of jurisdiction of Federal Courts, is in state of its creation.[4] The same rule has been applied to juridical entities which, for the purpose of Federal jurisdiction, are considered corporations, designated under the laws of the state of their origin and recognition.[5]

The third cause of action, which is predicated upon a restraint of trade, invokes the jurisdiction of the Federal Court, pursuant to Title 15, United States Code Annotated, Section 15, which provides as follows:

> "SUITS BY PERSONS INJURED; *amount of recovery:*
>
> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

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[3]*Barrow Steamship Co. v. Cane,* 170 U. S. 100, 42 L. Ed. 964; *Chicago etc. Railway Co. v. Stephens,* 218 Fed. 535.

[4]*Thomas v. South Butte Mining Co.,* 235 Fed. 968; *Peterborough Railway Co. v. Boston Railway Co.,* 239 Fed. 97; *Rojas-Adams Corporation of Delaware v. Young,* 13 F. 2d 988.

[5]*Puerto Rico v. Russell & Co.,* 288 U. S. 476, 482, 77 L. Ed. 903.

(c) *Jurisdiction of the Court of Appeals:*

The jurisdiction to hear and determine the within appeal, by this Honorable Court, is predicated upon the established law, that the Judgments of Dismissal, are "final decisions"[6] and the Summary Judgment, is also a "final decision."[7] Such legally established facts, make applicable 28 *United States Code Annotated,* Section 1291, which provides as follows:

> "Final Decisions of District Courts:
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Section 1294 of said code, provides that venue is in this Honorable Court, providing:

> "Circuits in Which Decisions Reviewable:
>
> Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeal as follows:
>
> (1) From a district court of the United States to the court of appeals for the circuit embracing the district; . . ."

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[6]*Wright v. Gibson,* 128 F. 2d 865; *Sosa v. Royal Bank of Canada,* 134 F. 2d 955; *Safeway Stores v. Coe,* 136 F. 2d 771; *Kelley v. Delaware River Joint Commission,* 187 F. 2d 93.

[7]*Lamb v. Shasta Oil Co.,* 149 F. 2d 729; *Pioche Mines etc. v. Fidelity etc. Trust Co.,* 191 F. 2d 399.

Statement of Case and Issues.

The basic case herein concerns appellant, a metaphysical healer, who was trained, accepted, approved, authorized and registered by the appellee church and placed upon its official professional register, published for said church by the appellee publishing company. This reference registry was for the public information of those who desired the professional services of persons, following the same profession and calling, as appellant. He caused his name to be withdrawn therefrom for a sabbatical period, at the conclusion of which he sought to have his name reinserted in such professional reference registry, as was the common and usual practice of the appellees and the registrees and listees therein. Without cause or provocation or the filing of any charges justifying such conduct, the appellees, despite their practice of long standing, refused to reinsert his name in said professional reference registry.

In his first cause of action, appellant sought to compel the reinsertion of his name in said professional reference registry, indicating his acceptance, approval and qualification as a practitioner of the appellee church and for damages for said refusal. In the second cause of action, appellant seeks damages for the loss of his income, of which he was deprived.

In addition to the foregoing, the appellees refused to carry any advertisement of a book written by appellant during said sabbatical period and refused to sell or otherwise trade or deal with book sellers or stores handling such book. For such conduct, appellant sought damages in his third cause of action.

The court's order and judgments of dismissal as to the first two causes of action raises the queries and ques-

tions of law: (1) Does the first count of appellant's second amended complaint state a claim upon which relief can be granted, and was it prejudicial error for the court to dismiss, with prejudice, the same? and (2) Does the second count of appellant's second amended complaint state a claim upon which relief can be granted, and was it prejudicial error for the court to dismiss, with prejudice, the same?

The summary judgment, raises the query and question of law! (3) Is the court's summary judgment, as to the third count of appellant's second amended complaint, supported by the pleadings and affidavits, and was it prejudicial error for the court to grant summary judgment as to said count?

Specification of Errors.

It is the contention of appellant that the trial court committed error by considering and granting a summary judgment as to the third count of said complaint predicated upon affidavits, which did not comply with Rule 56, subparagraph (e) of the Rules of Civil Procedure. Said rules dealing with summary judgment, requires that all such affidavits "show affirmatively that the affiant is competent to testify to the matters stated therein." The following affidavits do not comply with said rule in that they do not contain such affirmative showing:

Affidavit of Walter A. Dane [p. 40];

Affidavit of John H. Hoagland [p. 46];

Affidavit of Clayton B. Craig [p. 53];

Affidavit of Alfred Pittman [p. 71];

Affidavit of Gordon V. Comer [p. 75].

ARGUMENT.

I.

That the First Count of Appellant's Second Amended Complaint States a Claim Upon Which Relief Can Be Granted and That It Was Prejudicial Error for the Court to Dismiss With Prejudice, Such Count.

(a) *Statement of Claim:* By reason of the court's dismissal as insufficient to state a claim, as a matter of pleading, appellant respectfully invites the Court's attention to his first cause of action of his Second Amended Complaint wherein the same is plead [p. 8].

After alleging the diversity of citizenship and residence of appellant and appellees, in the first five paragraphs [pp. 9-10], appellant alleges in the sixth paragraph, the control of the other appellees by the appellee, the Christian Science Board of Directors [p. 10] and the control of the maintenance, teaching and practicing of Christian Science by the appellee, The First Church Of Christ, Scientist, In Boston, Massachusetts [par. VII, p. 10]; the function as to religious and secular printed matter by the Appellee, the Christian Science Publishing Society [par. VIII, p. 11], including the monthly printing of the Christian Science Journal containing the only list of registered, authorized and approved Christian Science Practitioners [par. IX, p. 12]; the prescription of the procedure to become an approved, authorized and registered Christian Science Practitioner [par. X, p. 13], and the pursuit of such procedure by appellant and his qualifications and acceptance, as a Christian Science Practitioner [par. XI, p. 14]; that only the names of approved and authorized Christian Science Practitioners were accepted for publication in the

Christian Science Journal [par. XII, p. 14]; the establishment by church law of procedures for discipline or expulsion [par. XIII, p. 15]; the chronology of appellant's application and acceptance of membership [par. XIV, p. 16]; his pursuit, completion and conclusion of the prescribed curriculum as a Christian Science Practitioner; his presentation of certification thereof, together with other matters required and his approval and acceptance as a Christian Science Practitioner on September 15, 1934 and the publication of his name indicating such approval and acceptance in the Christian Science Journal thereafter until October 17, 1949 [par. XV, p. 17]; his pursuit of such profession and his maintenance of his professional standing and practice [par. XVI, p. 18]; his voluntary request for the temporary removal of his name from such listing on September 12, 1949 [par. XVII, p. 19]; the completion of his sabbatical purposes and his written application for resumption and reinsertion in said professional reference registry on May 10, 1951 [par. XVIII, p. 19], and the continued refusal of the appellees to resume or reinsert appellant's name after said 10th day of May, 1951, without cause or provocation, or the bringing of any charges, accusations or other form of church indictment against him and his inability to pursue or continue his profession as a Christian Science Practitioner by reason thereof [par. XIX, p. 20]; resulting in his being deprived of his usual methods and means of livelihood and income and jeopardizing his reputation and prestige [par. XX, p. 21]; that appellant has exhausted all means available to him under church procedure for the restoration, resumption and reinsertion of his name, and he has performed all acts required of him by the appellees and that he is without a speedy, or adequate remedy at law [par. XXI, p. 21];

the established practice heretofore of reinserting upon application, the names of Christian Science Practitioners who voluntarily caused their names to be removed from the Christian Science Journal [par. XXII, p. 22], the necessity of such publication of a name in said Journal in order to be recognized as a Christian Science Practitioner by governmental agencies, public institutions, schools, hospitals or welfare organization or by branch churches of appellees [par. XXIII, p. 23]; the inability, by reason of the non-publication of his name, of appellant to obtain the services or assistance of a Christian Science Nurse, the maintaining of patients in a Christian Science institution, the sharing of offices with a Christian Science Practitioner whose name is published in said Journal and the non-recognition by persons desiring to ascertain his qualifications as a Christian Science Practitioner, by reason of such non-publication [par. XXV, p. 24]; that his damages are continuing, not readily ascertainable or sufficient so, to be compensatory [par. XXV, p. 24], and a prayer for damages in the sum of $100,000.00 [par. XXVI, p. 25].

(b) *Relief can be granted upon Claim:* Basically, such pleadings indicate a status or right on the part of the appellant to practice the professional calling of a Christian Science Practitioner. That although procedure therefore exists, he has not been deprived of such right by any church action. That one of the rights thereof is a continuation of his initial acceptance and recognition by the church as a practitioner, by the monthly republication of his name under the professional reference registry for public information, of the names of church approved, authorized and registered Christian Science Practitioners.

That he voluntarily withdrew his name for a matter of months of such listing, was not to appellant's detriment by reason of the established policy and custom of reinserting the same upon request. It is respectfully submitted by reason of the failure of the appellees to either justify their refusal to reinsert appellant's name by the bringing of church procedures or their failure to adhere to the custom of reinserting the same upon request, entitled appellant to judicial relief and damages sought in his first cause of action.

California, unlike most of her sister states, does not follow the policy that matters of the church are ecclesiastical and not subject to civil law suits. The within matter arose, occurred and transpired in California and therefore, the law of California governs the rights and damages of the parties. The law of said state is determinative whether or not the conduct of appellees is tortious.

> *Erie Railroad v. Tompkins* (1937), 304 U. S. 64, 82 L. Ed. 188.

Although the courts of California have refused to interfere in ecclesiastical practices, they have always been ready, willing and available to protect the civil and property rights of church members, even though the same may involve ecclesiastical matters.

For the purposes hereof, by reason of the same being an appeal from an Order of Dismissal, it is respectfully submitted that the allegations of the complaint must be accepted and considered as statements of fact. It has been said of an appeal from a Judgment of Dismissal, that the Court of Appeals is required to regard all of the allega-

tions of the complaint as though they had been established by evidence.

Holder v. St. Louis—San Francisco Ry. Co. (1949), 172 F. 2d 217, 218.

Such allegations indicate that the appellant had been educationally and morally qualified to practice the calling of a Christian Science Practitioner. Such calling is essentially and basically the pursuit of a profession.

72 *C. J. S.* 1215, 1216.

As stated in the case of *Cavassa v. Off* (1929), 206 Cal. 307, 274 Pac. 573, at page 314:

> "The right of a person to practice the profession for which he has prepared himself is property of the very highest character (Hewitt v. Board of Medical Examiners, 148 Cal. 590 (113 Am. St. Rep. 315, 7 Ann. Cas. 750, 3 L. R. A. (N. S.) 896, 84 Pac. 39)). Due to the severe and exacting tests, now generally required before a person can legally follow a profession at the present day, this right can only be acquired after years of arduous effort and closest application. It is generally the only means of the holder thereof whereby he may support himself and family and it usually affords such holder the best opportunity to become a useful and sustaining member of the community in which he resides. This right should not be taken from one who has thus acquired it, except upon clear proof that he has forfeited the same, . . ."

The basic principle that the right to follow a profession is a property right, is recognized in the case of *Franklin v. Franklin* (1945), 67 Cal. App. 2d 717, 725, 155 Pac. 637.

. Appellant has not been deprived of his right to practice his profession through any church procedure, nor through any other legal means. The sole means used was the failure to reinsert his name, in successive monthly publications of a professional list published and printed monthly as an indication of those who are authorized, registered and approved to follow such profession. Thus indirectly, he has been deprived of his right and status as a recognized and approved Christian Science Practitioner and his right and ability to follow such calling for the purpose of supporting himself and dependents. It is respectfully submitted that both civil and property rights are therefore involved and the protection thereof has found recognition in the laws of the State of California.

In the early case of *Hooper v. Stone* (1921), 54 Cal. App. 668, 202 Pac. 485, the court dealt with a controversy between factions of the appellees herein. There existed at the State University, an unincorporated association, teaching Christian Science. Certain members thereof were dissatisfied with periodicals issued and sold by the appellee, Christian Science Publishing Society. Said members caused their new group to be incorporated, including in the name thereof, the designation of the former organization. The plaintiffs asserted a property right in the name and sued the new corporation and incorporators to enjoin their use thereof. The defendants' demurrer was overruled and judgment was adverse to them and they appealed. The court held at page 673 of the California citation:

> "Nor do we see any merit in the remaining objection of the ecclesiastical courts. It is admitted that there is no tribunal within the Christian Science

denomination to which an appeal could be taken, the manual of the mother church providing for local self-government."

The recent case of *Providence Baptist Church v. Superior Court* (1952), 40 Cal. 2d 55, 251 P. 2d 10, pertains to the right of a pastor to his position and to receive the emoluments therefrom. At page 60 of the California citation, the court held:

> "We come, therefore, to the merits of the jurisdictional question. As long as civil or property rights are involved, the courts will entertain jurisdiction of controversies in religious bodies although some ecclesiastical matters are incidentally involved. Rosicrucian Fellowship v. Rosicrucian Church, 39 Cal. (2d) ....., 245 P. (2d) 481. That there are civil and property rights present is apparent from the findings and judgment. The real property of the organization and funds collected are involved. Necessarily involved in the determination of who shall be pastor is the question of who shall receive the emoluments of the office, which presents a problem involving civil and property right."

The court thereafter concludes at page 64:

> ". . . *No church tribunal has properly and finally acted. We are holding that the court may determine whether the rules of the society have been followed and if they have not what will be the resulting effect on civil and property rights.*" (Emphasis ours.)

A Writ of Prohibition to prevent proceeding with a cause of action involving such matters, was denied by the Supreme Court of California.

The leading case on this subject in California appears to be the case of *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church* (1952), 39 Cal. 2d 121, 245 P. 2d 481. The decision gives the historical background of this movement and the controversy between varied adherents thereto, as to the use of certain property. Said court establishes the principle on page 131 of the California citation:

> "The general rule that courts will not interfere in religious societies with reference to their ecclesiastical practices stems from the separation of the church and state, but has always been qualified by the rule that civil and property rights would be adjudicated. (See Watson v. Jones, 13 Wall. (U. S.) 679 (20 L. Ed. 666); Church of Christ of Long Beach v. Harper, 83 Cal. App. 41 (256 P. 476); Dyer v. Superior Court, 94 Cal. App. 260 (271 P. 113).) . . ."

Thereafter, the court at length, discusses and sets forth the distinction between matters ecclesiastical and civil and property rights.

Following the last cited two cases and predicated thereon, is the recent case of *Keeler v. Schulte* (1953), 119 Cal. App. 2d 132, 259 P. 2d 37. This also dealt with a theosophical society, wherein the membership had separated and the two factions each sought to control the property of the organization. There the court held at page 136:

> "It is fundamental that under the provisions of the Constitution of the United States (Amendment No. 14) no one shall be deprived of property 'without due process of law.' This provision has been held applicable to the property of a lodge ordered forfeited in the event of a suspension, revocation, or surrender

of a charter. (Supreme Lodge of the World v. Los Angeles Lodge No. 386, *supra;* Ellis v. American Federation of Labor, 48 Cal. App. (2d) 440 (120 P. 2d 79); Gallagher v. American Legion, 154 Misc. 281 (277 N. Y. S. 81).)

In Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church, *supra,* it is said (quoting from the syllabus):

'In a controversy between religious societies as to use of property and exercise of other rights, it is necessary to ascertain from the acts, dealings and usages of the parties where the various rights rest to determine the ownership of civil and property rights, even though some so-called ecclesiastical functions are so interwoven with civil and property rights that any decision involving the latter must necessarily affect the former . . .'

A sufficient property interest is involved which would entitle the courts to assume jurisdiction (Providence Baptist Church of San Francisco v. Superior Court, 40 Cal. 2d 55 (251 P. 2d 10).)"

The equitable relief of courts has been granted in cases of dismissal or expulsion without church authority or procedure (76 C. J. S. 809, 893, Religious Society, Secs. 48, 104). That equitable relief is available against a church organization is indicated in the case of *Giffen v. Christ's Church* (1920), 48 Cal. App. 151, 191 Pac. 718, where the court held at page 154:

"It is doubtless the law that when a religious corporation neglects or refuses to carry out its contractual obligations by failing or refusing to do or perform certain acts which lie within its power to perform, an action for specific performance against

> it may be successfully invoked. (Bowen *et al.* v. Trustees of the Irish Presbyterian Church etc., 6 Bosw. (N. Y.) 245; Congregation Beth Elohim v. Central Presbyterian Church, 10 Abb. Pr. (N. S.) 485; 34 Cyc. 1162; In the Matter of the Reformed Dutch Church, 16 Barb. (N. Y.) 237), . . ."

In California, injunctive relief has been authorized in a case involving a theosophical society.

> *Law v. Crist* (1940), 41 Cal. App. 2d 862, 865, 107 P. 2d 953.

It has also been held that mandamus may be applied to functions concerning churchmen. It being held in *Assembla Christina v. Zanpelli* (1932), 119 Cal. App. 515, 6 P. 2d 974, at page 516:

> "Hence, mandamus will lie to compel the delivery of the church books, records and papers by outgoing officers to their successors, and the rule has been so enforced in similar cases in other jurisdictions. (State v. Biedy, 50 La Ann. 258 (23 South 327); Proprietors of St. Luke's Church v. Slack, 7 Cush. (Mass.) 226.)"

Basically the within controversy arose by reason of the unprovoked and unjustified refusal of the appellees to abide by their moral and legal obligation to indicate appellant's qualification, approval and acceptance as a Christian Science Practitioner, by reinserting his name in the professional list maintained by them for such purpose.

It is respectfully submitted that the rights of the litigants are determined by the law of the State of California and that under such law, appellant's action, as plead in the first cause of action in his second amended complaint, con-

cerns itself with civil and property rights, of which he has been deprived without due process and that he is therefore entitled both to the equitable relief of the court and damages.

(c) *It is prejudicial error to dismiss with prejudice, said claim:* The order and judgment of the court dismisses the first cause of action with prejudice, and therefore precludes any further litigation of such claim [pp. 106 and 111]. It is respectfully submitted that the specific order of the court herein, is erroneous and therefore prejudicial to the rights of the appellant, since it precludes him from asserting legal rights and seeking legal damages to which he is entitled.

It is respectfully submitted that appellant was legally entitled to have the trial court hear the claims set forth in the first cause of action of his Second Amended Complaint and that if the allegations of said cause of action were proved, he would be entitled to judgment thereon since, as set forth in the legal authorities hereinbefore contained, according to the acts, deals and usages of the parties, he was entitled to have his name reinserted and republished as an approved, authorized and registered Christian Science Practitioner; a right which he was never deprived of by any church or legal procedure.

II.

That the Second Count of Appellant's Second Amended Complaint States a Claim Upon Which Relief Can Be Granted and That It Was Prejudicial Error for the Court to Dismiss With Prejudice, Such Count.

(a) *Statement of Claim:* Paragraph I of the second cause of action realleges the first twenty-five paragraphs of the first cause of action, omitting only paragraph XXVI, which contained the allegation of damages in the first cause of action [p. 25]. Thereafter, said cause of action alleges the maintenance of appellant of offices as a Christian Science Practitioner and the establishment of a clientele [par. II, p. 25]; collateral study and work by which he made himself more proficient in his calling [par. III, p. 26]; the realization of an annual income of $15,000.00 and the allegation that the same would have been increased to an annual sum of $25,000.00 and his damage and loss in said sum for the period that he was unable to follow said profession and calling [par. IV, p. 26]. The basic difference between the first and second causes of action is that the former dealt with appellant's status, reputation and position as a Christian Science Practitioner and a Christian Scientist, and the damages resulted in the loss thereof, while the second cause of action specifically deals with the damages occasioned by the loss of appellant's ability to pursue his profession and calling as a Christian Science Practitioner.

(b) *Relief can be granted upon claim:* Since the same basic facts are involved in the second cause of action, the

law applicable to which the court's attention has been hereinbefore invited in the argument as to the first cause of action, is equally applicable. Herein, without cause, justification or the attempted adherence to church procedure, appellant was effectively precluded from the following of his profession or calling. Under the laws of the State of California, wherein all acts occurred, such conduct was tortious. It is respectfully submitted that appellant is entitled to the damages which he suffered by reason of such tortious conduct.

75 *C. J. S.* 781, Religious Societies, Sec. 31c.

Such is the law of California wherein in the case of *O'Moore v. Driscoll* (1933), 135 Cal. App. 770, 128 P. 2d 438, concerns itself with torts committed by a church under a claim of discipline. Concerning the suggestion that a church is exonerated by reason of its purposes, the court held at page 774 of the California citation:

> ". . . Matter of discipline, also tortious, might give rise to a cause of action where alleged facts showed that it was within the scope of the corporations' purpose, and was done to further such purpose. There is no doctrine of exoneration of a charitable or religious order from civil responsibility for acts done within the scope of its corporate province, grounded upon the mere dedication of itself or of its funds to a charity . . ."

It is respectfully submitted that as part of the damage to which the appellant is entitled, he is entitled to recover the compensation from his profession and calling that he would ordinarily have received and which he was deprived of by the tortious acts of the appellees.

(c) *It is prejudicial error to dismiss with prejudice, said claim:* As in the Order and Judgment pertaining to the first cause of action, the court ordered and adjudged

dismissed, the second cause of action, with prejudice. For the same reasons that it was prejudicial to so order and adjudge the first cause of action, it is prejudicial to likewise preclude the appellant from ever trying and determining his rights under the second cause of action. It is respectfully submitted that since the appellant had qualified himself and established himself as a Christian Science Practitioner and had been accepted and approved by the appellees as such, which approval, acceptance and qualification were indicated by the publication of appellant's name in the professional listing, which was considered and used by parties desiring the professional services of a Christian Science Practitioner as a professional reference registry for public information and since appellant followed an established usage and purpose of withdrawing his name from such publication during a sabbatical period and since he, at the conclusion thereof, in full accordance with usual and customary practices, was entitled to have the same reinserted and republished and was willing to pay all necessary charges or fees therefore and since no church procedure had been pursued that at any time would have justified the exclusion of his name, the failure and refusal on the part of the appellees to reinsert and republish appellant's name, constitutes a violation of his rights, both as an individual, a churchman and a Christian Science Practitioner, for which he is entitled to the relief sought in his first and second causes of action. It is respectfully submitted, as hereinbefore plead, that the same is prejudicial as to the dismissal with prejudice, of the first cause of action and it is further respectfully submitted, that for the same logical reasons, the same is prejudicial as to the second cause of action.

III.

That the Court's Summary Judgment as to the Third Count of Appellant's Second Amended Complaint, Is Not Supported by the Pleadings and Affidavits, and That It Was Prejudicial Error for the Court to Grant Summary Judgment as to Said Count.

(a) *Statement of Claim:* In the first paragraph of the third cause of action, appellant realleges the first twenty-five paragraphs of his first cause of action and paragraphs II and III of his second cause of action [p. 27]. Thus, all factual allegations are reinserted by reference and only allegations of damage have been excluded. Appellant alleges therein that thereafter he pursued the advanced studies of his faith and the research and pubication of a book during the period of his sabbatical leave [par. II, p. 27]; the adherence of said book to the principles and precepts of Christian Science and its educational purposes to non-Chrsitian Scientists, sporadic Christian Scientists, the clergy of all faiths, and the medical profession [par. III, p. 27]; his tender of the manuscript to the appellees for their consideration and their refusal to examine the same or advise appellant in regard to the publication thereof [par. IV, p. 29]; his publication thereof after an elapse of several months [par. V, p. 29]. Thereafter, there is alleged the conspiracy of the appellees to hinder, delay and deny the circulation of said book, both "amongst the members of the Christian Science faith and the members of the public generally" and the overt acts of the appellees in furtherance of such conspiracy [par. VI, p. 29]; that appellees were the vendees, sellers and distributors of literature to branch churches, the reading rooms thereof and to book stores and vendors of literature in general, and the man-

date of the appellees that if any of the same, including such vendors and sellers of written reading matter and books, were to handle or sell appellant's said book, the appellees would thereafter refuse to furnish them with written reading matter and books upon which they were dependent and which were requisite to the maintenance of their business establishments [par. VII, p. 31]; the refusal to insert tendered advertisement in appellees' international newspaper of general circulation, and the failure to reinsert appellant's name as a Christian Science Practitioner in the Christian Science Journal by reason of such conspiracy [par. VIII, p. 31]; that the acts of the appellees were without cause, justification or provocation and were arbitrary, unwarranted, wilful and malicious [par. IX, p. 32]; that by reason of the nature of said book, its public acceptance is dependent upon the status and position of appellant as an approved, authorized and registered Christian Science Practitioner [par. X, p. 32] and the dimunition of the sales of said book to appellant's damage in the sum of $100,000.00 [par. XI, p. 32] and a request for punitive damages for $50,000.00 [par. XII, p. 32].

(b) *Findings of Fact, Conclusions of Law and Judgment of Trial Court:* Appellees' initial motion was to dismiss the third cause of action on the same grounds as they moved to dismiss the first and second causes of action [p. 36]. In its memorandum decision, the Trial Court indicated its preference "to treat the motion to dismiss, as a motion for summary judgment under Rule 12b and Rule 56 of the Rules of Civil Procedure, for the reason that matters outside the pleading, such as the Manual of the Mother Church in Boston, have been considered by the court" [p. 99].

Treating said motion to dismiss as a motion for summary judgment, the court made and entered the following Findings of Fact [p. 106]: The organization and functions of the appellee, The First Church of Christ, Scientist, in Boston, Massachusetts, to promote and disseminate Christian Science [par. a, p. 106]. That the appellee, Christian Science Board of Directors is a self-perpetuating trusteeship, having direction of all church matters [par. b, p. 106]. That the appellee, Christian Science Publishing Society is a trusteeship, which selects, approves and publishes the religious books and literature of the church [par. c, p. 107]. The admission of appellant as a member of said church and his approval and acceptance by the appellee church, and appellee, The Christian Science Board of Directors for listing as a Christian Science Practitioner in the Christian Science Journal. His voluntary removal of his name "*temporarily* from said listing for the purpose of enabling him to pursue and engage in further study and research in the field of Christian Science and the doing of expository writing pertaining to metaphysics . . ." (Emphasis ours.) His pursuit thereof and his written application for resumption and reinsertion of his name under said classified caption in the Christian Science Journal and the refusal of the appellees to resume or reinsert the publication of his name [par. d, p. 107]. His authorship and publication of the book in question during the period of his "*temporary*" withdrawal of listing [par. e, p. 108]. The refusal of the appellees to examine the manuscript or to communicate with appellant concerning said book or the publication thereof [par. f, p. 109]. His independent publication of such book [par. g, p. 109].

"That for the purposes of this motion the following allegations must be treated as true.

". . . 'that defendants . . . conspired . . . to hinder, delay and deny circulation of said book . . . amongst the members of the Christian Science faith and among members of the public generally' and 'have impugnated *(sic)* and vilified *(sic)* . . . the character, motives, ethical and professional standing of plaintiff in a manner . . . intended to injure, diminish, harm and destroy the value and status of such book'; that plaintiff has further so alleged, on information and belief, that said defendants 'notified . . . branch churches, reading rooms (and) book stores . . . (not to) . . . sell or distribute . . . said book' and that, if they did so, 'defendants would thereafter . . . refuse . . . to subsequently furnish them with . . . literature . . . and books' published by defendant Publishing Society; . . ." [Par. h, p. 109.]

"That it is true, as plaintiff alleges, that 'the "Manual of the Mother Church—The First Church of Christ, Scientist, in Boston, Massachusetts (by), Mary Baker Eddy" has been and now is the official By-laws of said (named) defendants'; that said by-laws governing defendants provide that 'only the (said) Publishing Society of (said) The Mother Church selects, approves, and publishes the books and literature it sends forth' and 'the literature sold or exhibited in the Reading Rooms of Christian Science Churches shall consist only of . . . writings . . . by Mary Baker Eddy . . . (and) also the literature published or sold by The Christian Science Publishing Society'; that it is true, as plaintiff alleges, 'that said reading rooms purchase all of their reading materials, of all types and descriptions,

exclusively from said defendant, The Christian Science Publishing Society.'" [Par. i, p. 110.]

"That also, under the ecclesiastical polity of said The Mother Church and under said bylaws governing defendants and all members of said The Mother Church, including plaintiff as a member thereof, and as set forth in said Manual, no member of said The Mother Church shall 'buy, sell, nor circulate Christian Science literature which is not correct in its statement of the divine Principle and rules . . . of Christian Science'; and 'a member of . . . (said) Church shall not patronize a publishing house or bookstore that has for sale obnoxious books.'" [Par. j, p. 110.]

The court also found concerning the appellees' refusal to carry advertising matter, in the appellees' international newspaper [par. k, p. 110].

From the foregoing Findings of Fact, the court concluded that the third count of the Second Amended Complaint presents no genuine issue as to any material fact, and that the appellees are entitled to a judgment as a matter of law [par. l, p. 111]. Summary Judgment was thereupon granted as to said third cause of action in favor of the appellees [p. 111].

(c) *The within count presents genuine issues as to material facts:*

The allegations of appellant's Second Amended Complaint include by reference, specific provisions of the "Manual of The Mother Church . . ." that deal with Christian Science Practitioners, the disciplining or expulsion of a Christian Scientist from the church for the alleged offense of misteaching Christian Science [par.

XIII, p. 15]. Annexed to the complaint as Exhibit "A," are six sections thereof, concerning such subject matter [pp. 34-36]. It is further alleged in the complaint that the same constitutes the sole and only provisions of said by-laws that deals with the disciplining of members of the church or practitioners belonging thereto [par. XIII, p. 16]. The part of the Manual cited in Finding "i," is not set forth in the complaint nor in the exhibit thereto attached. The same was set forth in the exhibit annexed to the affidavit of Gordon V. Comer, in support of appellees' motion to dismiss [p. 76]. Thus, such exhibit to said affidavit and not any allegation of the Second Amended Complaint, is the basis upon which the court made the material Finding of Fact, upon which its Summary Judgment was predicated.

The court's ability to resort to exhibits is limited to the exhibits pleaded by the appellant.

> *Simons v. Pevay-Welsh Lumber Co.* (1940), 113 F. 2d 812, 813.

The value of affidavits and their relationship to the type of motions involved, is set forth in the case of *Vale v. Bonnett* (1951), 191 F. 2d 334, where at page 337, the court held:

> "The place of affidavits in connection with summary judgment was examined and stated in Dewey v. Clark, *supra*. After discussing authorities, Judge Fahy announced the rule that 'affidavits may be considered to ascertain whether an issue of fact is presented but they cannot be used as a brief to decide the fact issue.' 86 U. S. App. D. C. at p. 143, 180 F. 2d at p. 772."

To the same effect are the earlier cases of *Hart & Co. v. Recordgraph Corp.* (1948), 169 F. 2d 580, and *Alamo Refining Co. v. Shell Development Co.* (1949), 84 Fed. Supp. 325.

Assuming but not conceding that by reason of said affidavit, such Manual was properly factually considered by the court, still the same would not preclude the issue of material facts between the appellant and the appellees. Basically, in paragraph VII of the third cause of action of his Second Amended Complaint [p. 30], appellant alleged that branch churches and the reading rooms thereof and various book stores and vendors of literature, reading matter and books, were subject to the appellees' ultimatum not to sell appellant's book or be boycotted from further sales by appellees. In its Finding of Fact, the court noted such "book stores" but did not set forth the salient facts that "vendors of literature, written reading matter and books" were involved and the further fact setforth in said paragraph, that the reading matter disbursed by appellees was requisite to the maintenance of the businesses of said book stores and vendors [p. 31]. If the Manual be properly admissible to support the Findings of the court "that the literature sold or exhibited in reading rooms of the Christian Science Churches" is limited to the exclusion of appellant's book [Finding i, p. 110], or that members of the church may neither circulate, nor patronize a book store that has for sale, obnoxious matter, this would only involve branch churches or their reading rooms. This leaves unanswered the material issue of fact, whether appellant's book is obnoxious.

Again, assuming but not conceding such fact, there is the germane and material issue of fact concerning the

ultimatum, not to branch churches or the reading rooms thereof, but to book stores and the vendors of literature, written reading matter and stores precluding them from selling appellant's book or facing a boycott from appellees.

(d) *The Third Count states an actionable claim:* Predicated upon the established principle of law that all the facts of the complaint are conceded to have been proven or otherwise established for the purpose of the type of motions herein involved, it is the contention of appellant that the actions of the appellees, as set forth in said third cause of action of his Second Amended Complaint, indicate a claim upon which he is entitled to relief, particularly when considered with regard to the ultimatum of appellees to said book stores and vendors generally.

Title 15 of the United States Code, Annotated, dealing with restraint of trade, covers this situation. The following sections of said Title provides as follows:

> "Section 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.* Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . .
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> * * * * * * * *
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> "Section 14. *Sale, etc., on agreement not to use goods of competitor.* It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the Dis-

trict of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

"Section 15. *Suits by persons injured; amount of recovery.* Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The case of *United States v. Eastman Kodak Co.* (1915), 226 Fed. 62, involves a comparable situation. Eastman Kodak Co., upon acquiring the patent rights of photographic paper, required of dealers, the exclusive handling of their product. Any dealer who used a competitor's product, was excluded from his dealership. The court, at page 79, held that these actions constituted an illegal restraint of trade.

In the case of *United States v. General Electric Co.* (1948), 80 Fed. Supp. 989, Chief Judge Knox of the District Court of the Southern District of New York, in ruling upon a matter involving restriction of contracts

pertaining to patented products distributed by the defendant, held at page 1009:

> ". . . The Sherman Act condemns not only the horizontal boycott directed against a competitor's business, Fashion Originators' Guild v. Federal Trade Comm., 1941, 312 U. S. 457, 668, 61 S. Ct. 703, 85 L. Ed. 949, but also the vertical boycott, directed at controlling the terms and manner of distribution of the subject article. United States v. Frankfort Distilleries, 1945, 324 U. S. 293, 62 S. Ct. 661, 89 L. Ed. 951; Paramount Famous Lasky Corp. v. United States, 1930, 282 U. S. 30, 51 S. Ct. 42, 75 L. Ed. 145; United States v. First National Pictures, Inc., 1930, 282 U. S. 44, 51 S. Ct. 45, 75 L. Ed. 151."

In the case of *Radio Corporation of America v. Lord* (1928), 28 F. 2d 257, plaintiff, in its sales contracts, required of its dealer purchasers, the non-dealing in competitor's goods. The court, at page 260, held:

> "However that may be, the defendant says that the so-called monopoly is lawful within the field of patented products, and that 'a covenant which would be lawful in one license is equally lawful in 25 licenses, if its operation relates solely to the manufacture of the patented article itself.' If it be conceded that, as an independent proposition, this statement may be sound, yet, if the contract for sale is made on the condition, agreement, or understanding that the purchaser shall not deal in the goods of his competitors, and the effect of the condition, agreement, or understanding may be to substantially lessen competition, or tend to create a monopoly, it is unlawful and prohibited by the Clayton Act. Section 3 of that act defines an illegal contract, 'and the patent right confers no privilege to make contracts in themselves

> illegal, and certainly not to make those directly violative of valid statutes of the United States.' United Shoe Machinery Corp. v. United States, 258 U. S. 451, 462, 42 S. Ct. 363, 68 L. Ed. 708."

Other cases following the principle of the *United States v. General Electric Co., supra,* are *United States v. Waltham Watch Co.* (1942), 47 Fed. Supp. 524, and *United States v. Bauch & Lomb* (1942), 45 Fed. Supp. 387.

While the principle of *Radio Corporation of America v. Lord, supra,* is adhered to in the cases of *United States v. Keystone Watch Co.* (1915), 218 Fed. 502, and *United States v. Standard Oil of California* (1948), 78 Fed. Supp. 850, which cases hold as illegal, the creation of a boycott.

The aforegoing principles of law pertaining to restraint of trade, have been enunciated by the Supreme Court of the United States.

In the case of *Eastman Kodak Co. v. Southern Photo. Materials Co.* (1927), 273 U. S. 359, the court considered a contract of the Eastman Kodak Co., which gave to the Southern Photo. Co., certain concessions in price for the non-handling of competitive products. When the latter did handle a competitive product, the Eastman Kodak Co. refused to sell it any merchandise. The court affirmed a judgment for damages on the theory that such actions constituted a restraint of trade.

In the case of *Montague & Co. v. Lowry* (1904), 193 U. S. 38, the court considered a contract of an association of wholesale dealers of tiles and like products in San Francisco, which placed prohibitions upon dealings by its members with non-members. At page 46, the court

noted that it was the desire of the association to require all dealers in such industry to join it for their general betterment. However, the court concluded at page 48, that such agreement was in restraint of interstate commerce and affirmed a judgment of the trial court, so holding the same.

In the case of *Fashion Originators Guild of America, Inc. v. Federal Trade Commission* (1941), 312 U. S. 457, the Guild prohibited its members from selling to retailers who handled duplications of the styles originated by its members. The case is similar to the case at bar, since the purpose was not to create any monopoly, but only prohibited dealing with duplicators who had incurred the displeasure of the Guild and its members. The court held that the failure to create a monopoly did not make such an agreement legal, but that the boycott thereby created, was in restraint of trade, stating at page 467 that the purpose of combination was the intentional destruction of the obnoxious form of duplication, thus creating competition with Guild members. The court concluded at page 468:

> ". . . Nor can the unlawful combination be justified upon the argument that systematic copying of dress design is itself tortious, or should now be declared so by us. In the first place, whether or not given conduct is tortious is a question of state law, under our decision in Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1186, 58 S. Ct. 817, 114 A. L. R. 1487. In the second place, even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of Federal law. And for these same reasons, the principles declared in Inter-

national News Service v. Associated Press, 248 U. S. 215, 63 L. Ed. 211, 39 S. Ct. 68, 2 A. L. R. 293, cannot serve to legalize petitioners' unlawful combination . . ."

It is respectfully submitted that the actions of the appellees as alleged and set forth in appellant's Second Amended Complaint, brings their conduct within that condemned by the foregoing cases and that appellant's claim predicated on such conduct, is both valid and proper.

(e) *That the affidavits relied upon by the appellees in support of their motion do not comply with Rule 56e and that it was prejudicial for the court to consider the same.* As indicated hereinbefore, in appellant's Specification of Errors, it is the contention of appellant that the affidavits relied upon by the appellees in support of their motions, do not comply with said rule and that such affidavits do not "show affirmatively that the affiant is competent to testify to the matters therein stated." Basically, the Findings of the court are predicated upon provisions contained in the Manual, which is made an exhibit annexed to the affidavit of Gordon V. Comer [p. 75]. Mr. Comer, in his affidavit, sets forth his church position, pursuant to said exhibit, but does not in any manner, authenticate such Manual in such affidavit. An examination of his affidavit indicates his activity for more than five years last past, but his assertions concern facts occurring in 1879, 1889 and 1892. The same, factually, do not constitute facts that he could testify to of his own knowledge. The authenticity of such Manual is predicated upon the certification of Hazel A. Firth, manager of the executive office, which is neither verified nor otherwise sworn to [p. 80]. Of the remaining four affidavits filed on behalf of the

appellees, in the affidavits of Clayton B. Craig [p. 54] and Alfred Pittman [p. 71], the conclusion is set forth that Exhibit "A" annexed to said affidavit of Gordon V. Comer is a true copy of the Manual. No facts are stated indicating its adoption, the date or manner thereof or the source of the knowledge upon which such statement is made. Such affidavits do therefore not comply with the mandate that they must affirmatively show that the affiant is competent to testify to the matters stated therein.

It does not appear that the other subject matter, of said other four affidavits, were considered by the court in adjudicating the summary judgment, but if subsequent contentions be made by the appellees that the same were germane, appellant reserves the right to supplement his present contention that such affidavits in their other statements, do not comply with said rule. Each of such affidavits contains hearsay matter and facts either not admissible into evidence or which the respective affiant is not competent to testify to.

(f) *That said Summary Judgment is prejudicial.* Predicated upon a similar situation of pleading and summary judgment, this Honorable Court held in the recent case of *Hoffman v. Babbitt Bros. Trading Co.* (1953), 203 F. 2d 636, in reversing a summary judgment of the trial court, at page 637:

> "'. . . Therefore, the judgment cannot validly be based upon the summary trial by affidavits. The plaintiff-appellant is entitled to have its complaint responded to by answer and both parties are entitled to have the issues tried through the introduction of exhibits and witnesses produced for direct and cross examination.' This is a statement of the general law and we know of no deviation from it. In giving

these principles effect, we find the United States Supreme Court in Associated Press v. United States (1945), 326 U. S. 1, 6, 65 S. Ct. 1416, 1418, 89 L. Ed. 2013, saying: '. . . We agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them . . .'

There is a very strong and genuine issue as to material facts left in the case when the complaint is laid beside the answer and the affidavits. The *ex parte* statements of the officer of Babbitt's and the county officials, even in affidavit form, do not foreclose other evidence being brought forth in the trial as to just what part Babbitt had in the matter."

It is respectfully submitted that by reason of said material issues and particularly the material issue concerning the conduct of the appellees with the book stores and vendors of literature, that the summary judgment granted by the court was improper and prejudicial to appellant.

Conclusion.

Appellant respectfully submits that for reasons and principles of law herein set forth, the judgment of dismissal, as to the first two causes of actions of his Second Amended Complaint and the summary judgment as to the third cause of action of said complaint, should be reversed.

Appellant invites the court's attention to the basic rule of law that the law favors a trial upon the merits of every controversy, as has been stated in *Woods v. Hillcrest Terrace Corporation* (1948), 170 F. 2d 980, at 984:

". . . there is no justification for dismissing a complaint for insufficiency of statement, except where

it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim pleaded. Leimer v. State Mutual Life Assur. Co., 8 Cir., 108 F. 2d 302, 306; Sparks v. England, 8 Cir., 113 F. 2d 579, 581, 582; Cohen v. United States, 8 Cir., 129 F. 2d 733, 736; Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co., 8 Cir., 131 F. 2d 419, 423, 424; Musteen v. Johnson, 8 Cir., 133 F. 2d 106, 108; Publicity Building Realty Corporation v. Hannegan, 8 Cir., 139 F. 2d 583, 586; Cool v. International Shoe Co., 8 Cir., 142 F. 2d 318, 320; Dennis v. Village of Tonka Bay, 8 Cir., 151 F. 2d 411, 412; Montgomery Ward & Co., Inc. v. Langer, 8 Cir., 168 F. 2d 182, 185."

Respectfully submitted,

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